STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: FIBERCOMM, L.C., FOREST CITY TELECOM, INC., HEART OF IOWA COMMUNICATIONS, INC., INDEPENDENT NETWORKS, L.C., AND LOST NATION-ELWOOD TELEPHONE COMPANY, Complainants, vs. AT&T COMMUNICATIONS OF THE MIDWEST, INC., Respondent.	DOCKET NO. FCU-00-3

ORDER DENYING MOTION FOR STAY

(Issued April 10, 2002)

BACKGROUND

On October 25, 2001, the Utilities Board (Board) issued its "Final Decision and Order" in this docket, finding (among other things) that AT&T Communications of the Midwest, Inc. (AT&T), constructively ordered access services from certain competitive local exchange carriers (CLECs) and that AT&T owes those CLECs for the access services it ordered and used. The Board directed the CLECs to re-bill AT&T for past access services provided, at the access rates specified in the CLECs' then-effective access tariffs, through the date of the order. AT&T (and other parties)

sought rehearing of the Board's order, and AT&T requested a stay of the final decision and order. The Board granted that request and stayed the effectiveness of its order while rehearing was pending. On January 25, 2002, the Board issued its order on rehearing, affirming the final decision and order and lifting the stay.

On February 22, 2002, AT&T filed a petition for judicial review of the Board's order in Polk County District Court.[1] On the same date, AT&T filed with the Board a motion for a stay of the Board's order pending conclusion of the judicial review proceedings.

AT&T's Motion For Stay

In its motion, AT&T asks for one of three alternative stays: First, AT&T asks that the Board stay the requirement that AT&T pay any access charges to the CLECs for past access services, pending resolution of AT&T's appeal. In the alternative, AT&T asks that the Board stay the final order to the extent it requires AT&T to pay access charges to the CLECs for past services rendered at rates that exceed the current Iowa Telecommunications Association (ITA) rates minus the carrier common line (CCL) charge.[2] Finally, if the Board will not grant the stay and AT&T is required to make payments to the CLECs, AT&T asks that the Board order each of the CLECs to post a bond for that portion of the CLEC's access charges for past periods that exceeds the rates of the ILECs serving the same exchanges.

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[1] AT&T Communications of the Midwest, Inc., v. Iowa Utilities Board, Polk County District Court AA No. CV 3985.

[2] This rate (the ITA access tariff rate minus the CCL) is the rate that the Board has directed the CLECs to apply to future access services, unless CLEC-specific cost information demonstrates a different rate is more appropriate.

AT&T argues that its stay should be granted because it is likely to succeed on the merits of its appeal. AT&T argues that it never ordered the CLEC access services in question and therefore does not owe any money to the CLECs. AT&T also argues that the Board's decision to require AT&T to pay past access charges is inconsistent with the Board's recent decision in Docket No. SPU-99-7, Re: Exchange of Transit Traffic, in which the Board did not require Qwest to pay past access charges. Because AT&T believes it will prevail on the merits, it believes it should not be required to pay the access charges at this time and then have to seek refunds in the future.

In support of its first alternative request for relief, AT&T notes that the Board has rejected the CCL as an element of CLEC access charges on a going-forward basis and argues that the same analysis should apply retrospectively, such that AT&T should only be required to pay the new, lower access rates to the CLECs for the access services provided in the past. AT&T argues the Board's order in this docket was issued pursuant to the authority of Iowa Code § 476.11, which permits the Board to set the terms for exchange of interexchange traffic, and there is nothing in that statute that limits the Board's decision to future application. AT&T also argues that § 476.3(1), the Board's general complaint authority, also gives the Board authority to order retroactive relief, citing (among other authorities) Mid-Iowa Community Action, Inc., v. ISCC, 510 N.W.2d 147, 150 (Iowa 1993).

In support of its second alternative request for relief, AT&T points out that Iowa Code § 17A.19(5)"a" authorizes an agency to grant "a stay on appropriate terms or

other temporary remedies", AT&T argues this authority is sufficient to permit the Board to require that the CLECs post a bond as a condition of receiving payments from AT&T.

Municipal Group Resistance To The AT&T Motion

Laurens Municipal Broadband Communications Utility and Coon Rapids Municipal Communications Utility (the Municipal Group) filed a resistance to AT&T's motion on March 7, 2002. The Municipal Group argues that issuance of a stay is a discretionary act that should be guided by the four-factor test from Teleconnect Co. v. ISCC, 366 N.W.2d 511, 513 (Iowa 1985) and Iowa Code § 17A.19(5). Those four factors can be summarized as follows:

1. Whether the applicant is likely to prevail on judicial review;
2. Whether the applicant will suffer irreparable injury if relief is not granted;
3. Whether granting relief to the applicant will substantially harm other parties to the proceedings; and
4. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

The Municipal Group argues AT&T fails on all four factors. First, it has no likelihood of success, since its actions clearly violated §§ 476.101(9) and 476.11. Second, AT&T's potential loss of revenues cannot rise to the level of "irreparable damages," see Teleconnect, 366 N.W.2d at 514. Third, the members of the Municipal Group will be substantially harmed if they must continue to wait to be paid for the access services they have rendered; AT&T owes one of them over $100,000 and the other one over $47,000. Finally, the public interest favors competition in the local

exchange marketplace, and the CLECs' ability to compete will be hampered if AT&T does not pay for access services they provide.

In the alternative, the Municipal Group argues that if a stay is issued, then AT&T should be required to post a bond amounting to 125 percent of the amounts owed, as AT&T is the party that currently owes money to other parties.

Complainants' Resistance To The AT&T Motion

On March 8, 2002, FiberComm, L.C., and the other complainants[3] (collectively, Complainants) filed a resistance to AT&T's motion. They argue that AT&T's request for stay should be judged by the four factors of § 17A.19(5) and, like the Municipal Group, argue that AT&T has failed on all four factors. They also argue that the Board has no authority to require the CLECs to file bonds in order to collect their tariffed rates; Complainants argue that appellate bonds are intended to protect the rights of a party when those rights have been established, but cannot be enforced until an appeal has been heard. Thus, AT&T might be required to post a bond to protect the rights of the Complainants, but the reverse situation does not justify a bonding requirement.

On March 15, 2002, Goldfield Access Network, L.C., joined in the resistances filed by the Municipal Group and Complainants.

[3] Forest City Telecom, Inc., Heart of Iowa Communications, Inc., Independent Networks, L.C., and Lost Nation-Elwood Telephone Company.

AT&T's Reply

On March 15, 2002, AT&T filed a reply to the Municipal Group and Complainants. AT&T argues that the four-factor test of § 17A.19(5) applies only to a reviewing court, not to an agency like the Board. AT&T argues an agency may stay its own actions on any "appropriate terms" and entry of the stay requested by AT&T is appropriate.

In the alternative, AT&T argues the four-factor test supports entry of a stay. AT&T argues it has previously shown a strong likelihood of success on the merits of its claims. AT&T next argues that if it is required to pay past access charges but then prevails on the merits, it may be unable to recoup the moneys paid because of the "questionable financial condition" of some CLECs. In contrast, AT&T claims, the CLECs "have offered no evidence at all that entry of a stay will cause them irreparable injury."[4] Finally, AT&T argues the public interest in competitive neutrality counsels strongly in favor of a stay, although AT&T does not explain how a stay will further that interest.

If the Board does not grant AT&T's request for a stay, then AT&T renews its request that the CLECs be required to post a bond for any charges that exceed the amount they would collect if they used the relevant ILEC access rates instead of their own, higher access charges. AT&T argues the purpose of a bond is to protect

[4] The Board notes that AT&T's argument mis-states the standard of the third factor; while the second factor requires AT&T to show that it would suffer "irreparable injury" is relief is not granted, the third factor only requires the resisting parties to show they would be "substantially harmed" if a stay is granted, a lower standard than the one applicable to AT&T.

against financial insecurity, so it is appropriate to require the CLECs post a bond, since AT&T believes their financial stability is in doubt.

Finally, AT&T makes a new request for relief, asking the Board to order the Municipal Group to comply with the Board's October 25, 2001, final decision and order when calculating the access charges alleged to be owed by AT&T. In that order, the Board said that the CLECs' access charges were unlawful and held that new, lower access charges should apply from the date of the order. The Municipal Group has since filed their compliance tariffs, proposing that the old, higher access charges should continue to apply until the effective date of the new tariffs.

While the Board granted AT&T's motion for a stay of the final decision and order while rehearing was pending, AT&T says it did not request a stay of this particular part of the order. Accordingly, the Municipal Group's proposal to continue to charge the old, higher access rates after October 25, 2001, is, according to AT&T, in violation of the order.

ANALYSIS

AT&T's Application for Stay

The Board finds it is appropriate in this proceeding to consider three of the four factors from Teleconnect and § 17A.19(5) in ruling on AT&T's request for a stay pending judicial review, even though the Board is not bound by that test when ruling on an application for a stay. Applying those factors to this case, the Board will deny AT&T's request.

The first factor is AT&T's likelihood of success on the merits of its appeal. The Board will give very little, if any, weight to this factor; an agency is unlikely to ever concede that a party is likely to prevail on judicial review, so if this factor were given significant weight, an agency would almost never exercise its authority under § 17A.19(5) and grant a stay.

The other three factors appear to be more appropriate for agency consideration:

1. The extent to which the applicant will suffer irreparable injury if relief is not granted;

2. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings; and

3. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

In this matter, AT&T has not shown it will suffer irreparable injury if it does not receive a stay. AT&T asserts that it should not be required to pay the CLECs for past access services provided at the tariff rates that were then in effect because if it prevails in the end, it may be unable to collect refunds from the CLECs. This mere possibility, without more, does not amount to "irreparable injury." There is no reason on this record to believe these specific CLECs would be unable to refund any overpayment to AT&T, if AT&T ultimately prevails in its appeal. Moreover, the Teleconnect court made an explicit finding, in similar circumstances, that a carrier's potential loss of revenue from paying access charges while judicial review is pending

"does not amount to irreparable damage." 366 N.W.2d at 514. This factor does not weigh in favor of granting AT&T's motion for stay.

As to the next factor, the Municipal Group and the Complainants have both alleged they will be substantially harmed if AT&T is permitted to further delay payment. Exhibit 13 from the hearing in this docket shows that roughly half of the Complainants' intrastate revenue comes from access, and AT&T represents a significant portion of the access traffic for at least some of the Complainants. They conclude from these facts that continued delay in payment of the amounts owed by AT&T to the CLECs could substantially harm the CLECs. Thus, unlike AT&T, the CLECs have shown that the amounts at issue are significant when compared to their overall revenues. This factor weighs against granting any of the alternative stays requested by AT&T.

The final factor, the public interest, should be the most important one in the Board's consideration. The Complainants allege that granting a stay would be contrary to at least two important public policies: Universal service and promotion of competition in the telecommunications marketplace. According to the Complainants, allowing AT&T to continue to withhold payment to the CLECs for access services rendered would be materially adverse to the CLECs and, therefore, to competition in the exchanges they serve. In contrast, AT&T offers only a conclusory statement that granting a stay would further the public interest in competitive neutrality, without explaining how that would be true. Presumably, AT&T is referring to competition between the ILEC and the CLEC, but the relationship between ILEC and CLEC

access charges is likely to be affected by the differing costs and service territories of the competitors, information that is not contained in this record. Thus, AT&T's allegations regarding the public interest are unsupported.

In the end, all three of the relevant factors weigh against issuance of a stay. The Board will deny AT&T's motion for a stay pending judicial review.

AT&T's New Complaint

As to AT&T's new complaint regarding the proposed Municipal Group compliance tariffs, the procedural background of this case is relevant. The Board stayed the effectiveness of its October 25, 2001, final decision and order while considering the various applications for rehearing. AT&T argues that the Board's stay was limited to only those parts of the final decision and order that AT&T asked the Board to stay, but the Board's intent was to stay the entire final decision and order, not just selected parts of it. Otherwise, the Board would have directed the CLECs to file compliance tariffs while it was rehearing the issues, which the Board did not do.

The Board stayed the entire final decision and order and, on reconsideration, affirmed it, including the finding that the new CLEC access rates should be effective since October 25, 2001, at least as applied to AT&T. The CLECs should apply their new, lower access charges to AT&T back to the date of the final decision and order. If any of the CLECs file for access charges that are higher than the level set in the final decision and order, or if they propose a different effective date, or if AT&T (or some other entity) challenges a CLEC's compliance tariff and argues the rates should

be lower, then the Board can determine in the subsequent proceeding whether the resulting new rates should apply back to October 25, 2001, but in the absence of any such proceeding, the CLECs must apply their new, lower access charges to AT&T beginning with access services rendered on and after October 25, 2001.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

AT&T's request for a stay of the Board's October 25, 2001, "Final Decision And Order" while judicial review proceedings are pending is denied.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 10th day of April, 2002.